United States Court of Appeals

for the Second Circuit

PETITIONER'S REPLY BRIEF

74-1951

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1951

AMERICAN TELEPHONE & TELEGRAPH CO.,
Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW AND TO SET ASIDE AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR PETITIONER AMERICAN TELEPHONE & TELEGRAPH CO.

PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for
American Telephone & Telegraph Co.
300 Park Avenue
New York, New York 10022
(212) 593-9000

Of Counsel
EDWARD SILVER
DAVID A. LEFF

PHILIP J. WESSEL
200 Park Avenue
New York, New York 10017

3

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 74-1951

AMERICAN TELEPHONE & TELEGRAPH CO.,

Petitioner,

—against—

NATIONAL LABOR RELATIONS BOARD,

Respondent.

ON PETITION FOR REVIEW AND TO SET ASIDE AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

REPLY BRIEF FOR PETITIONER AMERICAN TELEPHONE & TELEGRAPH CO.

Preliminary Statement

The brief submitted by the Board makes this reply necessary in order to refocus on the real issue before the Court. That issue is whether the Board's Decision and Order properly balanced the rights of the parties.

ARGUMENT

The Board's Brief Indicates That a Proper Balancing of Rights Was Not Made in This Case.

The Board acknowledges Walden's loud and insubordinate remarks [Bd. Br. 9] but argues that they were justified in the context of a Union-Company grievance meeting.* It relies once again for legal support on *Crown Central Petroleum Corp.*, 177 NLRB 322 (1969), *enf'd*, 430 F. 2d 724 (5th Cir. 1971),** although, as the Company has already argued, *Crown Central* actually supports Petitioner's position. [Co. Br. 13-14.]

The Board's brief attempts to justify its erroneous reliance on *Crown Central* by arguing that Beckett was assailed in his "office" and not on the plant floor within hearing of numerous employees. [p. 12, fn. 7.] However,

---

* The Board's brief also states that at "several points during the meeting Beckett heatedly told Walden that he would not continue the meeting unless her tone and manner improved." [p. 5.] By this statement, the Board is implying that both Walden and Beckett were arguing. The Administrative Law Judge held that only Walden was loud and abusive [134a-135a] and decided *all* credibility findings in favor of the Company. [134a.]

Furthermore, the Board's decision held that Beckett realized in his meeting with Walden that she was requesting clarification or additional information and that he was "resisting the claim of inadequacy." [142a.] In fact, the Administrative Law Judge credited Beckett's testimony that Walden sought neither clarification nor additional information, but merely criticized, in a highly insubordinate manner, the information already provided. [134a.]

** The Board's brief makes no attempt to justify its reliance on *Houston Shell and Concrete Co.*, 193 NLRB 1123 (1971), the other case it cited in its decision below. The Company argued that that case was distinguishable from this situation and, therefore, inapposite. [Co. Br. 12.]

Beckett's so-called office was a space *on the work floor*, only partially enclosed by partitions that did not extend to floor or ceiling. [105a, 196a.] The "office" did not have a door [42a, 111a] or any other means of ensuring privacy from the other employees who worked there. [111a.] The Company urges that these conditions are precisely those proscribed by the Fifth Circuit (430 F. 2d at 731).

Moreover, Walden's loud and abusive behavior did not take place in a formal grievance meeting, as she admitted. [70a.] Rather, she appeared in Beckett's "office" at a time not designated for union activities. [161a; Co. Br. 7.] Although it is true that on infrequent occasions Walden had presented herself to Beckett in a similar fashion, she had not often done so and she had never previously been loud or abusive. [64a, 102a.]

As the Fifth Circuit pointed out in *Crown Central, supra*, the setting and circumstances of the alleged impropriety are of central importance. While employees as union representatives are entitled to greater leeway in formal grievance sessions, this leeway does not extend to an employee who seeks out a company representative on the floor where he works and shouts at him within earshot of the people he supervises (430 F. 2d at 731).

The Board also challenges the Company's reliance on Walden's violations of two contractual provisions—to conduct union activities with respect and to conduct them outside of scheduled working hours—and terms this reliance "an afterthought." [Bd. Br. 14.] First, the collective bargaining agreement has governed the Union's and Company's labor relations for many years, and it is inconceivable that the Board's brief could seek to dismiss the Company's reliance on that agreement as an afterthought.

Second, as Beckett's unrebutted testimony clearly reveals, he had reminded Walden of their contractual obligation of mutual respect at the time he disciplined her. [107a.] Third, the Board's brief argues that Walden did not breach her contractual obligation of mutual respect because her "remarks were always germane to the matter of the information requested and were not uttered out of defiance or malice." [p. 14.] But, just three days before the incident, Walden had grieved that the Company had breached its obligation of mutual respect because of *"the tone and manner"* in which a supervisor spoke to an employee! [Co. Ex. 1, 19a; 96a.]

With regard to Walden's contractual obligation to conduct union business outside of scheduled work hours, she admitted that her presence in Beckett's cubicle was not a formal grievance meeting. [70a.] Nevertheless, the Board's brief argues that "her conduct was not so flagrant as to take her outside the protection afforded by Section 7." *

Here, Walden conducted union business outside a contractually designated grievance meeting and without the necessary respect that she herself had so recently been concerned about. Her shouting and abuse were so severe that employees working in the area stopped work because, as one testified, "it is not something you hear every day in the office." [117a.]

---

* The Board's brief erroneously argues that the Company's reliance on *Prescott Industrial Products Co.*, 500 F. 2d 6, 11 (8th Cir. 1974) [Co. Br. 15-16] is "misplaced." [Bd. Br. 13, fn. 9.] While the court there decided an issue that arose in a captive-audience-speech situation, it quoted, with approval, its decision in *NLRB* v. *Red Top, Inc.*, 455 F. 2d 728 (8th Cir. 1972), which dealt with union-company grievances. 500 F. 2d at 11.

Despite the foregoing, the Board's brief insists that the Company was not legally justified in issuing Walden a warning notice to preserve order and respect. *NLRB* v. *Thor Power Tool Co.*, 351 F. 2d 584 (7th Cir. 1965). It is therefore evident, beyond doubt, that the balancing of the rights of the parties was *not* controlling in the Board's determination of this case.

CONCLUSION

The Board's Decision and Order of June 20, 1974, should be set aside in all respects.

Respectfully submitted,

PROSKAUER ROSE GOETZ & MENDELSOHN
Attorneys for
American Telephone & Telegraph Co.
300 Park Avenue
New York, New York 10022
(212) 593-9000

Of Counsel

EDWARD SILVER
DAVID A. LEFF

PHILIP J. WESSEL
200 Park Avenue
New York, New York 10017

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775

C 321—Affidavit of Service of Papers by Mail.
Affirmation of Service by Mail on Reverse Side.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Index No. 74-1951

American Telephone & Telegraph Co.,

Plaintiff

against

National Labor Relations Board

Defendant

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF New York *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at

15 Brompton Road, Garden City, New York

That on January 15th *19* 75 *deponent served the annexed*
Reply Brief For Petitioner American Telephone & Telegraph Co.
on Michael S. Winer and John M. Flynn
attorney(s) for National Labor Relations Board
in this action at 1717 Pennslyvania Ave., N.W. Washington, D.C.
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in ~~a post office~~ official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Sworn to before me this
15th day of January 1975

Michael R. Cogliano

MICHAEL R. COGLIANO
NOTARY PUBLIC, State of New York
No. 41-5733485
Qualified in Queens County
Commission Expires March 30, 1976

Sandra Hile

The name signed must be printed beneath

Sandra Hile